Office - Supreme Court, U.S.
FILED
AUG 20 1984
ALEXANDER L. STEVAS
CLERK

84-293

No. A-1028

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

JOHN FERNEDING,

Appellant,

v.

CONSOLIDATED RAIL CORPORATION,

Appellee.

On Appeal From The Supreme Court
For The State Of Ohio

MOTION OF APPELLEE CONSOLIDATED RAIL CORPORATION TO DISMISS OR AFFIRM

GARY D. BULLOCK
[Counsel of Record]
Dinsmore & Shohl
2100 Fountain Square Plaza
511 Walnut Street
Cincinnati, Ohio 45202
(513) 621-6747
Counsel for Appellee
Consolidated Rail Corporation

Of Counsel:

CARL J. STICH, JR.
DINSMORE & SHOHL

August 17, 1984

COURT INDEX PRESS, INC. — 215 E. Ninth Street, Cincinnati, Ohio 45202 — (513) 241-1450

BEST AVAILABLE COPY

TABLE OF CONTENTS

	Page
STATEMENT OF THE CASE	1
A. The Procedure and Opinions Below	1
B. The Issues Raised Below, and the Absence of a Substantial Federal Question	2
C. The Incident Between Tarvin and Ferneding	3
I. THE APPEAL SHOULD BE DISMISSED AS FAILING TO CONFER APPELLATE JURISDICTION UNDER 28 U.S.C. § 1257(2)	5
A. This Case Does Not Fall Within the Standards for a § 1257(2) Appeal	5
B. No Federal Question Has Been Timely or Properly Raised, Nor Passed Upon by the Courts Below	6
C. This Case Presents No Substantial Federal Question	6
II. THE DECISIONS OF THE OHIO STATE COURTS SHOULD BE AFFIRMED	6
CONCLUSION	8
CERTIFICATE OF SERVICE	9

TABLE OF AUTHORITIES

CASES: **Page**

Brooks v. *Washington Terminal Co.*, 593 F.2d 1285 (D.C. Cir.), *cert. denied*, 442 U.S. 910, 99 S. Ct. 2823 (1979) 7

Davis v. *Green*, 260 U.S. 349, 43 S. Ct. 123 (1922) 2, 6

Euresti v. *Washington Terminal Co.*, 280 F.2d 629 (D.C. Cir. 1960) 7

Ochsrider v. *Reading Co.*, 172 F. Supp. 830 (E.D.Pa. 1959) 7

Sheaf v. *Minneapolis, St. P. & S.S.M. R. Co.*, 162 F.2d 110, 112 (8th Cir. 1947) 7

STATUTE:

Federal Employers' Liability Act, 45 U.S.C. §§ 51, et seq. 1

RULES:

Ohio R. Civ. P. 56 5

Fed. R. Civ. P. 56 5

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

No. A-1028

JOHN FERNEDING,

Appellant,

v.

CONSOLIDATED RAIL CORPORATION,

Appellee.

On Appeal From The Supreme Court For The State Of Ohio

MOTION OF APPELLEE CONSOLIDATED RAIL CORPORATION TO DISMISS OR AFFIRM

The appellee Consolidated Rail Corporation respectfully moves to dismiss the appeal herein, or in the alternative to affirm the judgments of the Supreme Court of Ohio, and the Court of Appeals of Ohio, pursuant to Sup. Ct. R. 16(1)(a), (b).

STATEMENT OF THE CASE

A. The Procedure and Opinions Below.

This action was filed under the Federal Employers' Liability Act, 45 U.S.C. §§ 51, et seq. Plaintiff alleges personal injury in the form psychological trauma resulting from an intentional tort committed by an off-duty Consolidated Rail Corporation ("Conrail") employee who threatened the plaintiff with a gun. The alleged tortfeasor, William Tarvin, is a named defendant, but is not a party to this appeal.

Conrail moved the trial court for summary judgment on the basis that Tarvin was acting outside the scope of his employment at the time of the assault. The record consisted of the deposition testimonies of Ferneding and Tarvin. Summary judgment was entered for Conrail. Plaintiff appealed to the Ohio Court of Appeals, which unanimously affirmed in a written opinion. Appendix A to Appellant's Statement of Jurisdiction. The court of appeals found the record conclusive that Tarvin's actions "were motivated by personal malice, that they were not committed in furtherence of the employer's business, and that they constituted in law an intentional tort falling outside the scope of the employment relationship." Slip. op. at 2; Appellant's Appendix at A-2. The court of appeals relied, in part, upon this Court's ruling in *Davis* v. *Green*, 260 U.S. 349, 43 S. Ct. 123 (1922).

Plaintiff moved the Ohio Supreme Court to exercise its discretionary jurisdiction to review the decision of the court of appeals. The motion was denied on March 24, 1984. Plaintiff thereafter docketed his appeal in this Court.

B. The Issues Raised Below, and the Absence of a Substantial Federal Question.

There are two noteworthy characteristics of the proceedings below. First, the primary theory of liability upon which the plaintiff relies in his appeal to this Court was waived at every level in the state court proceedings. The court of appeals recognized "respondeat superior as it has been applied under the Federal Employers' Liability Act" as the "only assignment of error presented to us for review." Statement of Jurisdiction, Appendix at A-2. The plaintiff's sole Proposition of Law presented to the Ohio Supreme Court, a recast version of the sole assignment of error in the court of appeals, consisted in its entirety of the following:

> Recovery may be had, under FELA law for personal injuries inflicted upon an employee by that employer's foreman, if that foreman is, at the time of the infliction

> of such injuries, acting within the scope of his employment, and in furtherance of his employer's business.

Plaintiff now devotes only one sentence in his entire Statement of Jurisdiction to respondeat superior and scope of employment. Statement of Jurisdiction at 9. The remainder of the argument is the "negligent hire" theory which, for reasons which will become obvious, was never raised in the courts below. This is the first time negligence has been argued as the basis for liability in this action.

The second noteworthy characteristic of the state court proceedings is the absence of *any* mention of a state/federal question. No "standard of review" issue was developed in any of the plaintiff's state court briefs or memoranda. Indeed, it appears that all parties agreed on the standard of review, which is the same for summary judgment under the applicable state rules as under the federal rules.

C. The Incident Between Tarvin and Ferneding.

At the time of the incident, Tarvin was employed by Conrail as Ferneding's supervisor. Shortly prior to the incident, Ferneding had recorded in his personal log book an accusation that Tarvin had wrecked a truck while it was in Ferneding's possession. (Ferneding now admits that the statement was completely without basis.) The personal log book was subject to random inspection by railroad supervisors. Tarvin learned of the false accusation, and was understandably upset.

Tarvin's anger apparently intensified. On the night of the incident he clocked out and went home at approximately 4:00 p.m.* While at home, he drank a twelve pack of beer.

---

* Although, as a supervisor, Tarvin was technically "on call" 24 hours a day, he had not been called to the yard on the night of the incident, but went there of his own accord. His normal shift ended at 4:00 p.m.

At around 8:45 p.m. Tarvin went back to the Conrail yard, in a condition which he described in his deposition as "drunk with a gun," and confronted Ferneding at a small building known as the signal shop. According to Ferneding, Tarvin first pulled the gun out when Ferneding expressed an intention to leave the signal shop and attend to his normal duties. Tarvin menaced Ferneding for approximately three and a half hours, holding him at gunpoint and forcing him to write a retraction of the false statement written in his personal log. The incident ended when Tarvin, having procured the written retraction, went home. He never fired the gun, never physically harmed the plaintiff.

Once the railroad learned of the incident, Tarvin was suspended and placed in an alcohol rehabilitation program. There is no evidence that Tarvin had ever before been involved in any violent, menacing, or drunken incident, nor is there any evidence that Conrail had reason to suspect he might erupt in such a fashion. Ferneding testified that, prior to the drunken episode at the signal shop, he and Tarvin had gotten along "fine," he had never heard of Tarvin doing anything dangerous or violent, and the incident in question came as a complete surprise.

There is no evidence that Tarvin had ever before appeared drunk while on Conrail property, or that his confrontation with Ferneding was motivated by anything other than his personal animosity toward the plaintiff. Tarvin testified that he brought a gun with him "[m]ainly because I knew that [Ferneding] carried one." Tarvin repeatedly acknowledged in his deposition that he returned to the railyard because he "was upset that [Ferneding] had put that in the log," that the substance of the conversation that night was "mainly over why he had put in his log book that I wrecked that truck," and that he was principally concerned with clearing his own good name.

The appellant's Statement of Jurisdiction seriously distorts the evidence in this case. No one told Tarvin to check on

Ferneding on the particular night of the incident, although he had general orders, as supervisor, to be responsible for Ferneding's work. Tarvin and Ferneding both testified that Conrail's rules prohibited the possession of guns or the consumption of alcohol on railroad property. The railroad's suspension of Tarvin after the incident is evidence that it did not acquiesce in such conduct. Finally, there is no evidence whatsoever that Tarvin's supervisor, Al Hendershott, played any role in this incident. He was not present at the signal shop, nor had he told Tarvin to go there that evening. Tarvin's own words reveals the personal nature of his drunken visit to the signal shop—a visit intended to clear his name, and confront the man who had falsely accused him. The Appellant's Statement of the Case no more reflects reality that did the accusation against Tarvin contained in the Appellant's log book.

I. THE APPEAL SHOULD BE DISMISSED AS FAILING TO CONFER APPELLATE JURISDICTION UNDER 28 U.S.C. § 1257(2)

A. This Case Does Not Fall Within the Standards for a § 1257(2) Appeal.

Plaintiff advances this appeal under 28 U.S.C. § 1257(2), which confers jurisdiction only over state decisions upholding the validity of a state statute allegedly in conflict with the Constitution or laws of the United States. Plainly no state statute is involved. The only statute at issue is the Federal Employers' Liability Act, which was dutifully applied in accordance with the rules of this and other federal courts. Portions of Federal and Ohio Rule of Civil Procedure 56 are set forth in the appellant's jurisdictional memorandum, but nowhere discussed therein. Nothing in Ohio Civil Rule 56 conflicts with any federal statute; indeed, the Ohio summary judgment rule is modeled on the federal rule. *See* Staff Note to Ohio R. Civ. P. 56. The plaintiff has manifestly

neglected to provide any support for the claimed appellate jurisdiction of this Court. This matter would be reviewable, if at all, only under petition for a writ of certiorari.

B. No Federal Question Has Been Timely or Properly Raised Nor Passed Upon by the Courts Below.

At every level below, the sole issue—as framed by both parties—was whether there were disputed questions of material fact sufficient that reasonable minds could come to any conclusion but that Tarvin had acted outside the scope of his employment. At no point did the plaintiff complain that the courts were erroneously applying state standards of review in lieu of federal standards. The claimed error was that the trial court failed to correctly apply the law to the facts, not that it failed to invoke the correct law. As the plaintiff has never raised a question of conflict between state and federal law, there has been no state decision which could confer § 1257(2) jurisdiction.

C. This Case Presents No Substantial Federal Question.

The Ohio Court of Appeals relied upon the leading intentional tort case decided under FELA law. *Davis* v. *Green*, 260 U.S. 349, 43 S. Ct. 123 (1922). The principles set forth in *Davis* are those traditionally found in respondeat superior actions, where scope of employment is the pivotal question. There is no reason for this Court to again travel that well-marked path.

II. THE DECISIONS OF THE OHIO STATE COURTS SHOULD BE AFFIRMED

In the alternative, Conrail moves the Court to affirm the decisions below, which are well-supported under FELA law. *Davis* v. *Green* requires that an employee be acting in furtherance of the employer's business before his tortious conduct may be imputed to the employer. It is thus established

that "where . . . an employee of a railroad company is injured by an unprovoked assault of a fellow servant . . . the employer is not liable unless the aggressor was at the time of the assault acting within the scope of his employment." *Sheaf* v. *Minneapolis, St. P. & S.S.M. R. Co.*, 162 F.2d 110, 113 (8th Cir. 1947). *See Ochsrider* v. *Reading Co.*, 172 F. Supp. 830 (E.D.Pa. 1959). A summary judgment or directed verdict is appropriate where the evidence is that the assailant was motivated by revenge or to further his personal interests. *Brooks* v. *Washington Terminal Co.*, 593 F.2d 1285 (D.C. Cir.), *cert. denied*, 442 U.S. 910, 99 S. Ct. 2823 (1979); *Euresti* v. *Washington Terminal Co.*, 280 F.2d 629 (D.C. Cir. 1960).

The undisputed facts in the case at hand establish the entirely personal nature of Tarvin's threats to the plaintiff. Certainly the railroad gained nothing from Tarvin's assault on Ferneding, which actually prevented the plaintiff from performing his duties. Tarvin's testimony leaves no doubt that he was on a personal frolic, motivated entirely by self-interest in securing a retraction of Ferneding's earlier misstatement. The assault was, moreover, a product of intoxication which occurred outside the control and contrary to the wishes of the railroad. Conrail is not liable under the Federal Employers Liability Act, or on any other theory, for this intentional offensive behavior.

As to the "negligent hire" theory, raised for the first time in this Court, the facts even as recited by plaintiff fail to support the claim that Tarvin was an obviously dangerous man. Even Ferneding admitted that Tarvin exhibited no prior indication that he would behave violently. As the plaintiff testified, "Well, everybody got along with him, you know. He was a good boss." Ferneding had never heard of Tarvin fighting or threatening anyone. Tarvin's threats to Ferneding were, by all accounts, unprecedented. The record contains no facts sufficient to raise an issue as to the railroad's negligence in hiring or retaining Tarvin.

Moreover, it is too late for the plaintiff to raise this argument. It was repeatedly and expressly waived below, never addressed in argument, nor passed upon by the Ohio courts.

CONCLUSION

For the foregoing reasons, Appellee Consolidated Rail Corporation respectfully requests the Court to dismiss the within appeal, or in the alternative to affirm the decisions of the Ohio Supreme Court and Ohio Court of Appeals.

Respectfully submitted,

.....
Gary D. Bullock
DINSMORE & SHOHL
2100 Fountain Square Plaza
511 Walnut Street
Cincinnati, Ohio 45202
(513) 621-6747

Attorney for Appellee
Consolidated Rail Corporation

CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of August 1984, three copies of this Motion to Dismiss or Affirm were served upon Harvey B. Woods, Esq., and Sharon A. Sullivan, Esq., 1212 Second National Building, 832 Main Street, Cincinnati, Ohio 45202, Counsel for Appellant. I further certify that all parties required to be served have been served.

.....

Gary D. Bullock